IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 06.11.2007

CORAM

THE HONOURABLE MR. JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR. JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

W.A. NO. 871 OF 2001
AND
W.A.M.P. NO. 4714 OF 2004

The Management of Madras Atomic
Power Project Employees Consumers
Co-operative Stores Limited
Kalpakkam, rep. by its Special Officer .. Appellant

- Vs -

1. The Deputy Commissioner of Labour
(Appeal), Madras - 6
The Appellate Authority under Section
41 (2) of the Tamil Nadu Shops and
Establishments Act, 1947.

2. A.L.Chidambaram. .. Respondents

Writ Appeal filed against the order dated 18.08.2000 passed by learned single Judge in W.P. No.2050 of 1994.

This Petition presented to this Court Under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records pertaining to the proceedings of the first respondent in TSC.No. 21 of 1992, dated 31.5.1993 to as to quash the same.

For Appellant : Mr. P.Anbarasan
For Respondent No.1 : Mr. K.Balasubramanian GA
R-2 -Mr. V. Santhanam.

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JUDGMENT

S.J.MUKHOPADHAYA, J.

The Management of Madras Atomic Power Project Employees Consumers Co-operative Stores Limited, having unsuccessfully challenged the order passed by the appellate authority under sub-section (2) of Section 41 of the Tamil Nadu Shops and Establishments Act, 1947, (hereinafter referred to as 'Shops Act') has preferred this appeal against the order passed by learned single Judge.

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2. The case of the appellant management is that the 2nd respondent, who was working as Assistant Manager at the stores of the appellant, admitted his guilt before the Board of Directors and took time to pay the

amount and submitted a bearer cheque for Rs.15,000/= on 1st July, 1991. In such background, the order of termination was issued on 6th July, 1991, giving one month's wages in lieu of notice period. The 2nd respondent challenged the order of termination by filing a suit on 10th July, 1991 in the Court of District Munsif, Chengalpet, in O.S. No.224/91. After some time, the said suit was withdrawn and an appeal under sub-section (2) to Section 41 of the Shops Act was preferred before the 1st respondent, Deputy Commissioner of Labour (Appeals)-cum-Appellate Authority u/s 41 (2) registered in TSC No.21/92. The said appeal was filed against the order of termination on 30th June, 1992, with a delay of about one year. The 1st respondent condoned the delay, entertained the appeal and allowed the appeal on the ground that the order of punishment was issued without any enquiry and giving liberty to the 2nd respondent. Against the said order, writ petition, W.P. No.2050/94 was preferred, which gave rise to the present appeal.

At this stage, it is pertinent to mention that the order was not implemented and so the 2nd respondent preferred Cont. Petition No.190/94 u/s 33 (C) (2) of the Industrial Disputes Act, 1947, on the file of the Labour Court, Madras. A second writ petition, W.P. No.4459/96 was also preferred for stay of the said proceeding, which has also been decided by common order dated 18th Oct., 2000, but no separate appeal has been preferred against the order passed in W.P. No.4459/96.

3. Before learned single Judge, the appellant mainly raised two issues to assail the appellate order, viz. :-

(i) that the 2nd respondent is a 'person employed' in a position of management (Assistant Manager) within the meaning of Section 4 (1) (a) of the Shops Act, hence, he cannot invoke the provisions of Section 41 (2) of the said Act.

(ii) there being delay in preferring the appeal, in absence of a petition for condonation of delay and without notice to the appellant, the delay could not have been condoned by the appellate authority.

On the other hand, according to the 2nd respondent, he is a 'person employed' within the meaning of Section 2 (12) of the Shops Act and as such he is entitled to claim the benefit u/s 41 (2) of the said Act. Further, according to him, the delay having been explained and appeal having been preferred along with petition for condonation of delay, it was rightly condoned by the appellate authority, being satisfied with the ground that the 2nd respondent was pursuing the remedy before the civil court.

4. We have heard the counsel for the parties who have again taken similar plea as was taken before learned single Judge and noticed above.

From the detailed order passed by learned single Judge, it will be evident that the learned single Judge noticed the factual position of the 2nd respondent and came to a definite conclusion that the 2nd respondent

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falls within the definition of "person employed" within the meaning of Section 2 (12) of the Shops Act. Referring to Section 2 (6), it was also held that the establishment in question also falls within the meaning of 'establishment' and, thus, the appellate authority had jurisdiction to entertain the appeal under sub-section (2) to Section 41 of the Shops Act.

5. Learned single Judge also noticed Tamil Nadu Shops and Establishments Rules, 1948, framed by the Governor of Tamil Nadu in exercise of power conferred by sub-section (1) to Section 49 of the Shops Ac, particularly Rule 9, which reads as follows :-

> "Rule 9. Appeals under Section 41 (1). -
>
> (1) The Deputy Commissioners of Labour in their respective areas assigned to them by the Commissioner of Labour shall be the authorities for the purposes of hearing appeals under sub-section (2) of section 41 of the said Act:
>
> Provided .....
>
> (2) Any appeal under sub-section (2) of Section 41 shall be preferred by the person employed within thirty days from the date of service of the order terminating the service with the employer, such service to be deemed effective if carried out either personally or if that be not practicable, by prepaid registered post to the last known address when the date of such service shall be deemed to be the date when the letter would arrive in ordinary course of post.
>
> Provided that an appeal may be admitted after the said period of thirty days if the appellant satisfies the appellate authority that he had sufficient cause for not preferring the appeal within that period.
>
> (3) The procedure to be followed by the appellate authority (Deputy Commissioner of Labour), when hearing appeals preferred to him under sub-section (2) of Section 41 shall be summary. He shall record briefly the evidence adduced before him and then pass orders giving his reasons therefor. The result of the appeal shall be communicated to the parties as soon as possible. Copies of the orders shall also be furnished to the parties, if required by them."

Having noticed sub-rule (2) to Rule 9 including the proviso thereto, learned single Judge held that the appellate authority was well within jurisdiction to entertain the appeal, being satisfied with the sufficient cause for not preferring the appeal in time.

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It is not in dispute that the respondent had shown sufficient cause for not preferring the appeal in time, as noticed by the appellate authority and the fact that the respondent was pursuing the matter before a court of law, in such a case, if delay has been condoned, no interference is called for merely on the ground that a separate petition was not filed for condonation of delay. In fact, there is no law laid down under the provisions of the Shops Act or Rules framed thereunder that a separate petition for condonation is to be filed or filing of separate petition is mandatory.

6. So far as the jurisdiction is concerned, we have noticed the detailed reasoning given by learned single Judge to come to a definite conclusion that the appellate authority had jurisdiction to decide the appeal u/s 41 (2) of the Shops Act. In the present case, in fact, it is not necessary to decide such issue as admittedly the order of termination was not passed in accordance with law. It has already been noticed that the order of termination was issued by way of punishment. It has been alleged that he had admitted his guilt, though no charge was framed nor any proceeding was initiated against the employee. In absence of any charge, it cannot be accepted that the employee had accepted the guilt and thereby enquiry was dispensed with.

Now it is settled law that if setting aside an order of High Court gives rise to revival of another illegal order, in such case, the High Court should not exercise its discretionary jurisdiction under Article 226 of the Constitution of India. In this background, the order of termination being penal in nature, having been passed without giving opportunity to the respondent, we are not inclined to interfere with the appellate order or the order passed by learned single Judge, as otherwise it will revive the illegal order of termination.

7. So far as backwages is concerned, the management had not taken any plea before the appellate authority or before learned single Judge that the respondent is not entitled for backwages, being in job in some other organisation during the intervening period. No such plea having been taken before the appellate authority or before the learned single Judge, or before this Court, we are not inclined to give any finding in this regard.

8. In the circumstances, no interference is called for in this appeal. There being no merit, the writ appeal is dismissed. Consequently, connected miscellaneous petition is also dismissed. However, there shall be no order as to costs.

GLN

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

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To
1. The Deputy Commissioner of Labour
(Appeal), Madras - 6
The Appellate Authority under Section
41 (2) of the Tamil Nadu Shops and
Establishments Act, 1947.
+ One cc to Govt Pleader SR 66589
+ One cc to Mr. P. Anbarasan, Advocate SR 66381
+ One cc to Mr. V. Santhanam, Advocate SR.66639
AKR (co)
sg 13/11/07

PRE-DELIVERY JUDGMENT IN
W.A. NO. 871 OF 2001

Pronounced on
06.11.2007

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